

**Questions/Answers on TJNAF Draft RFP
12/12/05**

- 1. Based on our understanding of the following DOE Directives, we do not believe that they are applicable to contractors and request the Department to consider deleting them from the final Request for Proposal (RFP) or explain their applicability to contractors.**

a. DOE O 224.2 – Auditing of Programs and Operations. Site/Facility Management Contractors are not listed in the “Applicability” Section and there is no associated Contractor Requirements Document (CRD). The Order states that it, “applies to all DOE Headquarters and field elements, including the National Nuclear Security Administration (NNSA).”

Answer: Agree. DOE O 224.2 will be removed from Appendix E.

b. DOE O 231.1A – Environment, Safety, and Health Reporting. While DOE M 231.1.1 Chg 1 that is associated with this Order is appropriate for contractors, the Order states in paragraph b. of Section 3 that it, “does not apply to site/facility management contractors.”

Answer: Although DOE O 231.1A paragraph b. of Section 3 states that the Order, “does not apply to site/facility management contractors,” the Requirements Section of the Order establishes DOE M 231.1-1 and DOE M 231.1-2 as mandatory Manuals for ensuring compliance with parts of the Order. DOE M 231.1-1A and DOE M 231.1-2 set forth requirements that are applicable to contractors; hence DOE O 231.1A, DOE M 231.1-1A and DOE M 231.1-2 will remain in Appendix E of the RFP.

c. DOE O 311.1B – Equal Employment Opportunity and Diversity Program. Site/Facility Management Contractors are not listed in the “Applicability” Section and there is no associated Contractor Requirements Document (CRD). The Order states that it, “applies to all DOE elements, including the National Nuclear Security Administration.”

Answer: Agree. DOE O 311.1B will be removed; however, the contractor must comply with 10 CFR 708, DOE Contractors Employee Protection Program, and the Civil Rights Act of 1964, Title 7.

d. DOE O 331.1B – Employee Performance Management System. Paragraph a. of Section 3 states that the Order “applies to DOE employees” and paragraph b. of Section 3 states that it “does not apply to Contractors.”

Answer: Agree. DOE O 331.1B will be removed from Appendix E.

e. DOE O 451.1B – National Environmental Policy Act Compliance Program. Section 3 states that the Order “Applies to DOE Elements, including the National Nuclear Security Administration (NNSA). Although contractors may assist in the Department’s NEPA implementation, the legal obligation to comply with NEPA belongs to DOE.”

Answer: Although NEPA is the legal obligation of the Department of Energy (DOE), the contractor must assist DOE in compliance and implementation of the law as appropriate. Offerors should take note of the first sentence in the third paragraph of Appendix E; “The contractor shall be aware of DOE policies, responsibilities, formats, guidance, and procedures and is responsible for effective interface with DOE.” Thus, DOE O 451.1B will remain in Appendix E.

f. DOE O 540.1 – Departmental Business Instrument Numbering System. Paragraph a. of Section 3 states that the Order applies to, “Primary DOE Organizations, including National Nuclear Security Administration (NNSA) Organizations.” Paragraph c. of Section 3 states that, “This Order does not apply to contractors.”

Answer: DOE O 540.1 has been replaced by DOE O 540.1A (same title approved 1/27/05). The sentence “This Order does not apply to contractors” has been removed. Offerors should take note of the first sentence in the third paragraph of Appendix E; “The contractor shall be aware of DOE policies, responsibilities, formats, guidance, and procedures and is responsible for effective interface with DOE.” DOE O 540.1A will be included in Appendix E.

g. DOE O 552.1 – Travel Policy and Procedures. Paragraph a. of Section 3 states that the Order applies to, “DOE Elements.” Paragraph b. of Section 3 states that, “This Order does not apply to contractors.”

Answer: Agree. DOE O 552.1 will be removed from Appendix E.

h. DOE O 2340.1C – Coordination of General Accounting Office Activities. While there is no “Applicability” section as is customary in DOE Directives, this Order is directed to internal DOE organizations. There is no associated Contractor Requirements Document and, in Section 7 Responsibilities and Authorities, no responsibilities or authorities are assigned to contractors.

Answer: Agree. DOE O 2340.1C will be removed from Appendix E; however, DEAR 970.5232-3 provides for GAO audit.

i. DOE O 3304.1A – Employment of Experts and Consultants. As in the above Order, there is no “Applicability” section. However, this Order is directed to internal DOE organizations. There is no associated Contractor Requirements document and Section 1 states that “This Order provides

guidance and instruction on the employment of experts and consultants in the Department of Energy.”

Answer: Agree. DOE O 3304.1A will be removed from Appendix E.

j. DOE M 552.1-1 – U. S. Department of Energy Travel Manual. Section DOE300-4.2 (Applicability) states that, “Provisions of this Manual apply to Department of Energy (DOE) employees, including employees of the National Nuclear Security Administration, consultants and experts employed intermittently by DOE, witnesses under subpoena, individuals in receipt of invitational travel authority, and eligible persons serving on DOE advisory committees.” Contractors are not mentioned and there is no Contractor Requirements Document.

Answer: Although this manual does not generally apply to the contract, it may become applicable to individual contractor employees if the applicable conditions are met. Offerors should take note of the first sentence in the third paragraph of Appendix E; “The contractor shall be aware of DOE policies, responsibilities, formats, guidance, and procedures and is responsible for effective interface with DOE.” Thus, DOE M 552.1-1 will remain in Appendix E.

k. DOE N 221.10 – Reporting Fraud, Waste, and Abuse. It appears that DOE N 221.11 superseded this Notice as of September 20, 2005. Nevertheless, both Notices are directed to DOE employees. See Section 1. Purpose. Contractors are not mentioned and there is no Contractor Requirements Document.

Answer: Although Notice 221.11 is not required, it provides the current hotline phone numbers that are required to be posted in accordance with DOE O 221.1. Notice 221.11 should be included in Appendix E to ensure that current hotline phone numbers are available for posting.

l. DOE N 413.2 – Value Engineering. This is a policy that is directed to internal DOE organizations. Contractors are not mentioned. Also, the notice appears to have been superseded by DOE P 413.2 which is again directed to internal DOE organizations. There is no Contractor Requirements Document.

Answer: DOE N 413.2 will be replaced by P 413.2 in Appendix E. Offerors should take note of the first sentence in the third paragraph of Appendix E; “The contractor shall be aware of DOE policies, responsibilities, formats, guidance, and procedures and is responsible for effective interface with DOE.”

- 2. We recommend that the final Request for Proposal (RFP) delete clause I.33 FAR 52.223-6 Drug-Free Workplace (May 2001) since this is a full and open competitive solicitation. It is noted that the draft RFP appropriately contains**

clause I.103 DEAR 970.5223-4 Workplace Substance Abuse Programs at DOE Sites (DEC 2001).

Answer: Since the RFP includes the DEAR clause, the FAR clause has been removed.

- 3. We recommend that the final Request for Proposal (RFP) include the clause at FAR 52.215-16 Facilities Capital Cost of Money in the event that an offeror decides to include facilities capital cost of money in its proposal.**

Answer: Disagree. Provision 52.215-16, Facilities Capital Cost of Money is not appropriate for a Management and Operating contract.

- 4. In I.107(c)(1) the word “not” should be included after “The Contractor agrees” in order to conform to the standard provision (DEAR 970.5227-2).**

Answer: The word “not” will be added to I.107 (c)(1).

- 5. Based on our understanding of the following DOE Directives, we do not believe that they are applicable due to the nature and work of the Thomas Jefferson National Accelerator Facility and request the Department to consider deleting them from the final Request for Proposal (RFP), or explain their applicability to this RFP.**

a. DOE O 475.1 – Counterintelligence Program. The Contractor Requirements Document associated with this Order is to be only included in site/facility management contracts for contractors that are required to conduct Counterintelligence Programs. There is no contract provision that requires the Thomas Jefferson National Accelerator Facility (TJNAF) to conduct such programs (see DEAR 070.0404-4), nor does such a provision appear appropriate.

Answer: This order is applicable because of current National security emphasis in the area of counterintelligence. DOE O 475.1 will be included in Appendix E.

b. DOE O 5530.3 – Radiological Assistance Program. Section 3 of this Order states that the “provisions of this Order are to be applied to covered contractors, and the provisions will apply to the extent implemented under a contract or other agreement. A covered contractor is a seller of supplies or services involving radiological emergency response awarded to a Management and Operating (M&O) contract.” There is no coverage under

the current contract and there is no indication in the draft RFP that DOE intends coverage under the new contract.

Answer: Agree. DOE O 5530.3 will be removed from Appendix E.

c. DOE N 450.13 (Extension of DOE 450.7 – The Safe Handling, Transfer, and Receipt of Biological Etiologic Agents at Department of Energy Facilities). As stated in Section 3 of the Notice, the Contractor Requirements Document (CRD) “is intended to apply to any DOE major facilities contractor that may transfer, use, or receive etiologic agents, including biological select agents, through any means.” This Order does not appear appropriate for TJNAF.

Answer: Agree. DOE N 450.13 will be removed from Appendix E.

d. DOE O 472.1C and DOE M 472.1-1B. We recommend that DOE O 472.1C, Personnel Security Activities, and DOE M 472.1-1B, Personnel Security Program Manual, be deleted from the final RFP since TJNAF does not host security clearances.

Answer: There is a new DOE Order (DOE O 470.4, Safeguards and Security Program) issued 8/26/2005 that combines all of the security orders into one. As a result, this order will be added to Appendix E and canceled orders will be removed. There have also been recent changes that impose additional requirements for contractor employees that have access to Government facilities; therefore, DOE N 206.2, Personal Identity Proofing, will be incorporated for these additional requirements. DOE O 472.1C and DOE M 472.1-1B will be removed from Appendix E.

- 6. Article H.8(a) provides that each member of a partnership, joint venture or limited liability company (LLC) must meet the requirements of (1) (2) or (3) of the Article in order to qualify as nonprofit. If a member of the LLC has majority control and retains its status as a 501(c)(3) organization under the Internal Revenue Code, does a for profit member of the LLC, who does not have majority control, prevent the LLC from being subject to Article H.12, Limitation of Liability, I.113 Patent Rights Non Profit Organizations and I.133 Property? It should be noted that it is much easier to implement a technology transfer program where the contractor has Bayh-Dole rights under a provision such as I.113.**

Answer: Clause H.8 will be amended to delete subparagraph (a)(4).

There is not a bias in favor of non-profit organizations and it was not the intention of the Agency to appear as if it was discouraging the partnering of non-profit and for-profit entities. The resulting definition of a “non-profit” organization will be

identical to the definition found in the Bayh-Dole Act. The decision of whether the offeror will be a non-profit or a for-profit entity resides with each offeror.

See also the response to question 7.

- 7. Article H.8 Additional Definitions (a) along with Article L.5 Specific Instructions (c), would seem to encourage and anticipate, respectively, a non-profit contractor status for the bidding entity. Specifically, according to H.8(a), any mix of for-profit in the ownership structure apparently renders the bidder a for-profit entity for purposes of the solicitation. In L.5(c), the total available performance fee for each fiscal year of the contract is \$3.1M (~3.4% of an estimated \$91.0M fee base). However, based on the fee schedule for R&D contracts in DEAR 970.1504-1-6(b)(2), this number appears to have been calculated using the 25% tax-related fee discount that is usually applied to non-profit contractors. Is this correct? If yes, will DOE consider a higher total available performance fee if an offeror is a for-profit organization? If no, is it intended that the tax discount factor will not re-appear during the DOE Operations/Field Office Manager's annual determination of the "total available fee earned" that would be due the contractor each year, according to I.95(c)(1&2) of the RFP? Answers to these questions have significant financial and other implications to potential offerors as we note that tax status is a consideration in calculating the total maximum fee since the fee is taxable for for-profit but not taxable for non-profit entities and, additionally, the associated determination on eligibility for a cap on liability and Bayh-Dole rights, etc.**

Answer: The Program Office has determined that the maximum fee included in the RFP is appropriate for this procurement. The Department of Energy has no preference whether the successful offeror is of profit or non-profit status, and views the structure of the entity as a business decision of the offeror.

Please note that the maximum fee is a maximum, and, as stated in Provision L.5, "The fee proposed for each year shall not exceed, but may be less than, the maximum fee amounts specified."

Offerors are reminded that in accordance with Provision L .1, that "The Government intends to evaluate proposals and award a contract without discussions with offerors...Therefore, the offeror's initial proposal should contain the offeror's best terms from a cost or price and technical standpoint."

The Fee Determination Official's annual determination of the "total available fee earned" that would be due the contractor each year will be in accordance with the provisions of Section J, Appendix B, "Performance Evaluation and Measurement Plan.

Also, see the responses to questions 6 and 8.

8. **The definition of "non-profit" in Section H.8 of the RFP is more restrictive than that used by the IRS. Since this serves to discourage any partnering between "non-profit" (majority) and "for-profit" (minority) [loss of a liability cap, Bayh-Dole rights, etc.] as well as between a "for-profit" (majority) with a "non-profit" (minority) [required to pay tax on what would appear to be an already discounted fee], would DOE consider changing to the IRS definition, with a non-discounted fee, to encourage the formation of the strongest (unconstrained) partnerships for the benefit of the government as well as the laboratory?**

Answer: Clause H.8 will be amended to delete subparagraph (a)(4).

There is not a bias in favor of non-profit organizations and it was not the intention of the Agency to appear as if it was discouraging the partnering of non-profit and for-profit entities. The resulting definition of a "non-profit" organization will be identical to the definition found in the Bayh-Dole Act. The decision of whether the offeror will be a non-profit or a for-profit entity resides with each offeror.

The performance fee and taxes applied to that fee will not be adjusted in order to account for the offeror's for-profit/non-profit status. Applicable taxes, if any, will be in accordance with the requirements of the I.R.S.

See also the response to question 7.

9. **RE-DOE O413.2A (Laboratory Directed Research and Development)**
> Does the current contractor have authority to accumulate and expend LDRD funds? > If so, are these "no year" funds that can be carried over into the next FY? Or do they revert back to the Treasury if not expended during the funding FY?
> If accumulating LDRD funds is permitted, what were the amounts accrued in FY2004 and can comparable amounts expected under the next contract? What is the method used to accrue LDRD funds - WFO tax? OH charges? Other?"

Answer: DOE O413.2A will be removed from Appendix E as it does not apply to the Thomas Jefferson National Accelerator Facility.

10. **In reviewing several documents on the TJNAF SEB website, it appears that the Commonwealth of Virginia provides resources to the Thomas Jefferson National Accelerator Facility. What is this arrangement?**

Answer: The Commonwealth of Virginia has provided resources that have been used to support the Thomas Jefferson National Accelerator Facility. This is not a

Federal arrangement with the Department of Energy, but has been a direct arrangement with the current contractor.